



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Yale Materials Handling Corporation

File: B-230209

Date: March 23, 1988

DIGEST

1. Protest that delivery requirements are impossible to attain for any bidder but the incumbent, and therefore unduly restrict competition, is denied where agency presents a reasonable explanation in support of the delivery requirements as necessary to meet its minimum needs and protester fails to show that those requirements are clearly unreasonable.
2. Protest questioning the propriety of the two-step sealed bidding method of procurement is untimely where the basis of the protest was evident from the face of the solicitation and was not raised until after the closing date for receipt of bids under step two.
3. Protester's allegations that short delivery schedule provided in solicitation was necessitated by agency's poor advance procurement planning and that agency otherwise mishandled procurement are untimely where they were filed more than 10 days after the bases of protests were known or should have been known to the protester.

DECISION

Yale Materials Handling Corporation protests the delivery requirements under invitation for bids (IFB) No. N00024-87-B-5488 issued by the Naval Sea Systems Command (NAVSEA). The IFB, step two of a two-step solicitation, sought 68, 24-volt electric pallet trucks for use on Aegis Class ships for handling ammunition.

The Navy issued step one of the solicitation, a request for technical proposals (RFTP), on June 19, 1987, and 45 companies requested copies. Only two offerors, Blue Giant

Equipment Corporation 1/ and Yale, submitted timely technical proposals by the closing date of August 10, 1987. Evaluation and discussions continued into December 1987.

The units solicited are essentially standard commercial pallet trucks meeting the required dimensions and modified to incorporate a deadman brake and electromagnetic interference (EMI) features. The pallet trucks, used to load, transport and stow pallets of ammunition weighing 3,300 pounds, must also meet salt fog environmental and high physical shock requirements. Older models currently in use had been found unsuitable and unsafe for use on the Aegis Class ships.

Each RFTP package contained a sample copy of the step two IFB but offerors were advised that the government was not bound by the terms of the sample. The actual IFB, issued on January 22, 1988, provided delivery requirements identical to those in the sample: delivery of the first article test report 60 days after contract award; delivery of the first 5 production units 120 days after award; and delivery of the remaining units in 12, 5-unit and 1, 3-unit increments every 14 days thereafter. The delivery schedule was designed to meet Navy contractual obligations to furnish the pallet trucks to the shipyards in time to ensure compatibility with ship design and to be available for use in sea trials.

Yale complained to the Navy that the delivery requirements were impossible to meet and offered in the alternative to provide the first article test report 240 days after contract award (150 days for design and fabrication plus 90 days for testing). Production was proposed to commence 120 days after first article approval, with two monthly deliveries of 35 and 32 units, respectively. The Navy offered to extend the first article report delivery to 90 days, but did not amend the IFB because Yale stated it could not meet the 120-day production unit delivery schedule.2/

1/ Blue Giant had provided 24-volt pallet trucks under a 1986 contract awarded it in a competition restricted in accordance with Federal Acquisition Regulation § 6.302-2 (FAC 84-5). The justification and approval for the restricted competition provided that future pallet trucks would be procured through full and open competition. The two-step solicitation was issued as a result of that policy.

2/ Yale apparently misunderstood the Navy's intentions and believed the Navy planned to extend Yale's delivery time without amending the solicitation. In view of the Navy's

As a preliminary matter, the Navy contends that Yale's protest of the delivery schedule is untimely. The Navy argues that since Yale received a copy of the delivery schedule in the sample step two IFB, enclosed for informational purposes with the step one RFTP package, it was required to file its protest prior to the closing date for receipt of technical proposals under step one. We find the Navy's argument without merit, in view of the fact that the cover letter, furnished with the RFTP, plainly states that the government was not prevented from changing delivery schedules. While Yale was on notice as to the Navy's intended delivery schedule, it was not on notice of the actual schedule until the IFB was issued. Since Yale timely filed a protest with the Navy prior to bid opening, its subsequent timely filing of a protest with this Office makes Yale's protest of the delivery schedule timely.

Yale complains that the delivery requirements are impossible to meet for any firm but Blue Giant. Due to a need for advance scheduling of outside laboratories necessary for some first article tests, Yale asserts that it is not possible for it to design and test a unit within 60 days. Consequently it alleges that the Navy has unduly restricted competition by showing a preference for Blue Giant.

The Navy responds that it has a legitimate, minimum need for expeditious delivery of the first article and production units and denies that the schedule is impossible to meet. According to the Navy, the delivery schedule is necessitated by "Schedule A" delivery obligations it has to furnish five pallet trucks for each new Aegis cruiser and three Aegis destroyers prior to the commencement of sea trials. The purpose of the Schedule A deliveries is to ensure that the shipyards have sufficient time to make any necessary shipboard modifications to accommodate the pallet trucks. The Navy already anticipates needed modifications to the adapter which secures the pallet truck on the ammunition elevator. Failure to make timely deliveries can result in claims by the shipyards for delay or disruption. Further, the pallet trucks must be available for use on the ships during sea trials for shipboard ammunition handling tests and assisting in dockside loading operations.

The Navy has an immediate need for 15 of the 68 pallet trucks solicited. These 15 are necessary to equip a cruiser already undergoing sea trials and to meet the June and July

explanation, we find that Yale's assertion that the Navy was willing to disregard procurement regulations in this respect is without merit.

Schedule A delivery dates for two other cruisers. The remaining 53 pallet trucks are to be delivered in 11, 14-day increments and will be used to meet Schedule A dates ranging from February 1989 through January 1992. The Navy explains that it combined its immediate and long term needs to satisfy its requirements because it perceived that a single large quantity acquisition, rather than several smaller ones, would provide the lowest reasonable cost. Additionally, a single acquisition ensures that the Navy will be prepared to meet all future Schedule A and sea trial delivery obligations for ships already ordered.

In regard to whether the delivery schedule is impossible, despite its needs, the Navy states that Navy technical personnel determined that the schedule for first article production and testing was reasonable. This determination was made prior to issuance of the RFTP and has been confirmed upon re-review. According to the Navy, the performance specifications were designed to give bidders maximum flexibility in modifying existing commercial units to meet the dimensional, deadman brake, and 24-volt battery specifications. Since incorporation of these requirements into an existing pallet truck does not require substantial engineering effort, the Navy maintains that a first article can be fabricated, with some pre-engineering, within 30 days. First article testing, with advance planning, can be accomplished in the remaining 30 days.^{3/} In any event, the Navy notes that it was willing to extend the deadline for first article testing to 90 days and that Blue Giant has not expressed any inability to meet the stated delivery requirements. While the Navy acknowledges that Blue Giant might be able to obtain a waiver of some first article testing requirements, the decision has not yet been made and

^{3/} Yale noted in its protest, and the Navy acknowledges, that the IFB does not set forth the Navy's deadline for approving or disapproving of the first article. The Navy now advises that it intends to make this decision, immediately after submission and review of the report. Blue Giant has not protested this defect in the solicitation and the Navy is satisfied that award to Blue Giant will meet its needs. Under the circumstances, we find that Yale was not prejudiced by this defect since, even if the time for approval had been stated in the IFB, Yale's proposed delivery schedule establishes that it could not meet the Navy's delivery schedule. See Pacific Coast Utilities Service, Inc., B-220394, Feb. 11, 1986, 86-1 CPD ¶ 150 (defective solicitation does not justify cancellation after bid opening if award will meet the government's actual needs and there is no prejudice to other bidders).

absent waiver, Blue Giant must meet all testing requirements.

Yale responds that there was inadequate competition, maintaining that the delivery schedule is possible only for Blue Giant because of that firm's experience with the earlier contract and its potential to obtain first article test waivers. Yale apparently agrees that the dimensional, 24-volt battery, and brake requirements are not a significant design problem, but maintains that the requirements regarding EMI, salt fog resistance, and high shock capability cause severe design problems. In support of its position, Yale notes that some unidentified NAVSEA technical personnel would agree that only a manufacturer that had designed, built, and tested a truck could meet the schedule. It also has submitted a copy of its 1982 first article test report for the 12-volt version of the pallet truck to establish that testing cannot be accomplished within the 60 days allotted.

When a protester challenges a solicitation's delivery schedule as unduly restrictive of competition, the burden initially is on the procuring agency to establish prima facie support for its contention that the restriction is reasonably related to meet its minimum needs. Once the agency establishes support for the challenged solicitation terms, the burden shifts to the protester to show that they are clearly unreasonable. Microwave Radio Corp., B-227962, Sept. 21, 1987, 87-2 CPD ¶ 288; Environmental Tectonics Corp., B-222568, Sept. 5, 1986, 86-2 CPD ¶ 267.

We find that the Navy has established the required prima facie support for its minimum delivery needs. The Navy has contractual obligations which require expeditious delivery of the pallet trucks to allow the shipyards adequate time to ensure the compatibility of the trucks with the ships and to make any necessary modifications prior to scheduled sea trials. The trucks are required for those sea trials for use in loading ammunition and completing shipboard ammunition handling tests. Failure to meet these schedules risks claims of delay by the shipyards and would interfere with required sea trial testing.

We further find that the protester has not met its burden of showing that the Navy's requirements are clearly unreasonable.

First, where, as here, any competitive advantage is due to a prior contract, and not to preference or unfair action by the government, the government is not required to equalize the competitive position of the bidders. See, e.g., Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD

¶ 309. This includes situations where a competitor may obtain waiver of first article requirements. Lavelle Aircraft Company, B-204381.3, June 2, 1982, 82-1 CPD ¶ 515. The number of possible sources for an item or service does not determine the restrictiveness of solicitation provisions. See Mid-Atlantic Service & Supply Corp., B-218416, July 25, 1985, 85-2 CPD ¶ 86. Consequently, even if only one firm can meet the delivery requirement, this does not establish that the agency's delivery schedule is not reasonably related to its minimum needs. See generally Gerber Scientific Instrument Co., B-197265, Apr. 8, 1980, 80-1 CPD ¶ 263.

Second, Yale does not convince us that the schedule for the first article testing is impossible to meet. There is nothing in the record that establishes that the delivery schedule is impossible to attain. Yale itself admits that the unit to be produced is "an adaptation of a very mundane piece of equipment," but takes issue with the required high shock, EMI, and salt fog resistance features. However, Yale's 1982 test report and its technical proposal tend to support the Navy's position more than its own position.

While Yale's 1982 first article testing spanned 75 days, actual testing days plus apparent shipping time between Yale and independent laboratories took less than 50 days. Although Yale maintains that it cannot design a unit and coordinate the various testing activities within the 60 days permitted under this solicitation, we agree with the Navy that advance planning and some pre-engineering could have alleviated Yale's scheduling problems. Moreover, according to Yale's technical proposal, it intended to use one of its latest models modified to use a 24-volt power system. The proposal stated that this model was "fundamentally the same" as the 1982 12-volt model it supplied to the Navy under earlier contracts and noted that it had met high shock and EMI requirements. Further, Yale requested and obtained approval, through amendments to the solicitation, to deviate slightly from certain of the original dimensional specifications and ascension capability. Thus, it would appear that Yale's successful production and relevant testing of the 12-volt pallet truck would assist it in meeting the Navy's first article delivery schedule. This is especially true in light of the Navy's willingness to allow an extra 30 days for production of the first article.

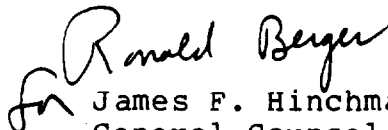
It appears that Yale's performance problems are due not so much to the schedule established by the Navy, but to Yale's reluctance to risk more than minimal pre-engineering on a first article. Although subject to change, the Navy's proposed delivery schedule was known to Yale at the time it submitted its proposal. Presumably, it also was aware of

its own anticipated need of 240 days to produce a first article. Further, it was aware of its past scheduling problems for first article testing as well as the rigors of the first article tests. Yale's business decision to wait until award to commence design and fabrication of a first article does not make the Navy's delivery schedule unreasonable.

Yale also questions the propriety of the use of two-step sealed bidding by the Navy. Since this alleged impropriety was apparent prior to the closing date for receipt of initial technical proposals under step one, Yale's protest, filed after that date, is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1)(1987).

Likewise, we will not consider Yale's untimely complaints regarding the Navy's handling of the procurement (e.g., late delivery of portions of the solicitation) ^{4/} and its implied assertion that the short delivery schedule was necessitated by the Navy's poor advance procurement planning. In view of Yale's knowledge of the Navy's handling of the procurement, its prior procurement history, the proposed delivery schedule, and its own assessment of the time necessary to produce and test a first article, it is clear that Yale knew or should have known these protest bases more than 10 days prior to the filing of its protest. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel

^{4/} Moreover, we note that in virtually every instance of mishandling cited by Yale, the Navy furnished missing portions of the solicitation, answered questions, issued amendments, and even extended the closing date by 2 weeks to accommodate Yale due to its late receipt of the RFTP. Under the circumstances it appears that the Navy did all it reasonably could to include Yale in the competition.